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5 In the Matter of

No. G02-45

6 THE APPLICATION REGARDING
7 THE CONVERSION AND
8 ACQUISITION OF CONTROL OF
9 PREMERA BLUE CROSS AND ITS
10 AFFILIATES

OIC STAFF'S MOTION TO
DISREGARD PREMERA'S LATE-
FILED AMENDMENTS TO FORM A

11 INTRODUCTION

12 1. The OIC Staff believes that to ensure a fair determination of the merits of the
13 Application ("Form A") of Premera Blue Cross and its Affiliates ("Premera"), the parties and
14 the public must be sufficiently and timely apprised of the elements of the Form A to permit
15 meaningful participation in this proceeding. This extends as well to the role that the OIC
16 Staff's consultants are intended to play in this process. The Commissioner and the public are
17 entitled to receive and take into consideration the consultants' reports with respect to the Form
18 A that is pending before the Commissioner. The consultants' reports will only be useful to the
19 Commissioner and to the public insofar as they are focused on a version of the Form A that is
20 the subject of the proceeding and not one that has been superceded. For these reasons, the
21 OIC Staff requests the Commissioner to disregard all amendments of Premera's Form A
submitted after October 15, 2003.

22 PREMERA'S AMENDMENT OF THE FORM A

23 2. As evidenced by the Thirteenth Order, the Commissioner contemplated that the
24 Form A could and would be amended. Specifically, he established a deadline of October 15th
25 for amendment of the Form A by Premera. As discussed in the Declaration of James T.
26 Odiorne ("Declaration"), which is attached hereto and incorporated herein for all purposes,

1 this is consistent with the ordinary practice in considering Form A applications; they may be
2 amended to address concerns raised by the staff to satisfy regulatory requirements including
3 removal of potential bases for disapproval. Premera elected not to take advantage of the
4 opportunity afforded by the Thirteenth Order and submitted no amendment to the Form A
5 within the time prescribed by the Commissioner.

6 3. On October 17, 2003, Premera submitted two documents to the OIC Staff. First, it
7 submitted an outline listing “specific transaction structure comments.” (Exhibit “F” to the
8 Declaration.) This document consists of a table, thirty-one pages in length, with four
9 columns: the first contains an identification number, the second lists the specific provision in
10 the Form A addressed by the consultants in their draft reports, the third summarizes the
11 substance of the consultants’ issue or concern, and the fourth sets forth Premera’s response to
12 the consultants’ issue or concern and/or indicates Premera’s position concerning whether or
13 not it will accept the consultants’ position or be willing to enter into discussions concerning
14 the issue. John P. Domeika, Senior Vice President and General Counsel, states in his letter to
15 Deputy Insurance Commissioner Odiorne transmitting the outline, “Given the
16 interdependencies among many of the transaction terms addressed by the Consultants’
17 Comments ... you and the state’s consultants will need to jointly consider how the resolution
18 of any particular item will impact the entire structure of Premera’s proposed reorganization.”
19 (Exhibit “E” to the Declaration.) Clearly, the intent of this document is to set the parameters
20 of discussions between the OIC Staff and Premera for the purpose of amending Premera’s
21 Form A after the October 15th deadline. Premera recognizes that agreement as to one issue
22 could have an impact on other aspects of the transaction potentially redefining the nature of
23 the Form A. To comprehend the significance of this document, it is necessary to explain the
24 events leading up to its submission.

25 4. Early in the week of October 6th, representatives of Premera approached the OIC
26 Staff and communicated Premera’s willingness to meet with the OIC Staff and the consultants

1 to attempt to address the concerns raised in the consultants' draft reports about certain
2 provisions of the Form A. The OIC Staff interpreted Premera's statement of interest as
3 potentially leading to an amendment of the Form A. Premera's position that it did not propose
4 to amend its Form A was made clear at the prehearing conference held on October 8th.
5 Premera advised the OIC Staff in a meeting after the close of the prehearing conference that it
6 did not intend negotiations to result in an amendment to the Form A. Rather, resolution of the
7 consultants' concerns would be presented to the Commissioner in the form of agreed
8 conditions for approval of the Form A under RCW 48.31C.030(5)(a)(ii)(C). In other words,
9 Premera contemplated that it and the OIC Staff would submit to the Commissioner a joint
10 series of recommendations enumerating agreed conditions for removal of potential bases for
11 disapproval (the consultants' concerns) for incorporation into an order approving the Form A.

12 5. As outlined in the Declaration (Exhibits "A" through "D"), the OIC Staff
13 communicated its concerns to Premera about Premera's intentions and Premera agreed to an
14 accelerated schedule for discussions to attempt to address the concerns. Without waiving its
15 position that Premera has amended or is attempting to amend its Form A after the deadline for
16 doing so has passed, the OIC Staff agreed to meet with representatives of Premera on October
17 22nd for the purpose of discussing simplification of issues consistent with the spirit of RCW
18 34.05.431(1). The OIC Staff believes that until the Commissioner rules on this motion or
19 otherwise provides the parties with guidance on this question, the OIC Staff has no recourse
20 but to agree to meeting with Premera particularly in light of the time constraints imposed by
21 the case schedule.

22 6. In connection with the meeting, Premera agreed to identify three groups of issues
23 by 3:00 pm, Friday, October 17th: (1) those that are acceptable to Premera without
24 negotiation; (2) those that are totally unacceptable to Premera; and (3) those considered
25 by Premera as offering an opportunity for meaningful discussion. The outline (Exhibit "F" to
26 the Declaration) discussed in paragraph 3 above was intended to fulfill this commitment. By

1 3:00 pm, Monday, October 20th, the OIC Staff agreed to identify those issues from group 3
2 that it concurred appear to offer an opportunity for meaningful discussion. The OIC Staff
3 complied by sending to Premera Exhibit “J” to the Declaration. The parties will meet on
4 October 22nd to engage in discussions of the issues as framed in Exhibit “J.” By 3:00 pm,
5 Friday, October 24, the OIC Staff and Premera agreed to furnish to the OIC Staff’s
6 consultants and the Interveners a memorandum memorializing the results of the discussions
7 for the purpose of incorporating the results into the consultants’ final reports and, to the extent
8 allowed by law, publicizing them to the public. Of course, this memorandum will be
9 furnished subject to the Commissioner’s ruling on this motion. There is no guarantee that the
10 OIC Staff and Premera will be able to arrive at a resolution with respect to any matters under
11 discussion within the agreed time frame and, even if there is agreement, it is not likely that its
12 outcomes will be reflected in the consultants’ final reports.

13 7. On October 17th, Premera submitted a second document to the OIC Staff that
14 included an “Equity Incentive Plan” (Exhibit “H” attached to the Declaration) which, as
15 pointed out by Mr. Domeika in his transmittal letter to Deputy Insurance Commissioner
16 Odiorne (Exhibit “G” attached to the Declaration), is a direct response to the deficiency notice
17 issued by the Commissioner in connection with the proceedings held before Superior Court
18 Judge Paula Casey. This submission is clearly intended to amend Exhibit G-10 of Premera’s
19 Form A and is not timely filed. Exhibit G-10 of Premera’s Form A states that the boards of
20 directors of Premera and PBC had not approved a stock ownership plan but that it was
21 anticipated that at some future date [New Premera], as a stock company, would adopt one or
22 more of such plans. Exhibit G-10 contains a general description of the limitations and
23 restrictions applicable to such future stock ownership plans. The OIC Staff has instructed the
24 consultants, subject to the order of the Commissioner, to make every effort to review the
25 Equity Incentive Plan and incorporate their findings in the final reports.
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1 8. It is obvious that the Equity Incentive Plan constitutes an amendment of the Form
2 A. The outline (Exhibit “F” attached to the Declaration) also constitutes an amendment of the
3 Form A (category 1 responses) as well as an attempt to enter into negotiations designed to
4 result in an amendment (category 3 responses). A review of the document reveals that it
5 covers many of the most critical elements of the Form A. It is not a list containing a few
6 modest proposals but contemplates changes to significant elements of the transaction that
7 could affect many of the aspects of Premera’s Form A. The outline reveals that Premera plans
8 amendments or potential amendments to the Form A affecting, among others, the following
9 Form A exhibits: Exhibits E-1 through E-4 (Foundation Shareholder and Washington
10 Charitable Organization articles of incorporation and bylaws); Exhibit G-3 (Stock Restrictions
11 Agreement); Exhibit G-4 (Voting Trust and Divestiture Agreement); Exhibit G-5
12 (Registration Rights Agreement); Exhibit G-6 (Stockholders Protection Rights Agreement);
13 Exhibit G-8 (Indemnification Agreement); and Exhibit G-10 (Stock Ownership Plans).
14 Moreover, the contemplated areas of discussion include issues of great import such as what
15 measure, if any, of control [New Premera] will be permitted to exercise over the proposed
16 Foundation Shareholder, *i.e.*, VT-1 and VT-2; RR-2 through RR-6; IA-1; and CO-1 and CO-
17 7.

18 **DEADLINE FOR AMENDMENT OF FORM A**

19 9. Premera’s reliance upon RCW 48.31C.030(5)(a)(ii)(C) for the purpose of avoiding
20 the Commissioner’s deadline for amending the Form A is misplaced. This provision was
21 never intended to be used as a vehicle to integrate substantial changes into a Form A but only
22 to serve as a method of conditioning approval on removal of a few impediments to approval
23 of the Form A. In the ordinary course of a Form A proceeding, the applicant and the OIC
24 engage in a dialogue early in the process for the purpose of assisting the applicant to comply
25 with regulatory requirements. Where compliance is possible, the dialogue may result in
26 amendment of the Form A that will satisfy the OIC that the transaction meets the applicable

1 requirements and should therefore be approved. The OIC Staff invited Premera to engage in
2 such a dialogue in February 2003 when many of the issues contained in the outline had been
3 identified but Premera declined the invitation and elected to wait until this late date to begin
4 the process.

5 10. Even if RCW 48.31C.030(5)(a)(ii)(C) were intended to be applied as Premera
6 suggests, the Commissioner, as presiding officer, has exercised his authority to regulate the
7 course of the proceeding by limiting the time in which Premera would be allowed to modify
8 the terms of the Form A transaction by establishing a deadline for amendment of the Form A.
9 *See, e.g.,* WAC 10-08-130. To the OIC Staff's knowledge, Premera did not move for
10 reconsideration of the Commissioner's Thirteenth Order that established the deadline. By
11 exercise of that authority, the Commissioner put the parties and the public on notice that there
12 would be no amendments to the Form A after the deadline permitting them to focus their
13 efforts on comprehending the terms of the transaction, confident that the terms would not
14 change in a material way. By establishing a deadline for amending the Form A, the
15 Commissioner thereby precluded amendment by any means attempted after the deadline had
16 passed. If Premera were allowed to amend the Form A now, it would defeat the purpose of
17 the Commissioner's action and invite further amendments. For example, nothing would
18 restrain Premera from delaying submission of new changes to the Form A until January 15,
19 2004, the date the adjudicative hearing is to commence. Submission of changes to the Form
20 A after the deadline will deny the parties the ability to address the new terms of the
21 transaction particularly in view of the time constraints that require a final determination by
22 March 15, 2004.

23 **FAIRNESS OF THE PROCEEDINGS**

24 11. Premera's actions threaten the integrity of the process. If new terms or conditions,
25 whether agreed or not between the OIC Staff and Premera, are presented to the Commissioner
26 at the hearing, the public and the Intervenors will have been denied an opportunity to assess

1 and test the final form of the transaction, and, taking into consideration the very aggressive
2 schedule under which the parties are operating, in all likelihood all parties will be denied the
3 opportunity to identify witnesses and properly prepare for the adjudicative hearing. This will
4 result in a *de facto* amendment of the Form A without providing proper notice. In addition, if
5 the subject of the hearing, the consultants' reports, and discovery is based on the filed Form
6 A, the record will not clearly support a final decision that includes an "agreement" and *de*
7 *facto* amended Form A.

8 12. The process urged by Premera also undermines the Commissioner's representation
9 to the public that the process would be as public as possible. If Premera and the OIC Staff
10 negotiate up until the time of the hearings, and at that time present some "agreement", the
11 perception will be that the process was not public and was the result of a "back room deal."

12 13. If the discussions result in material changes to the Form A, the changes may not
13 be publicized in time for the public to consider them in the public testimony to be taken by the
14 Commissioner at hearings scheduled for December. This will make it difficult, if not
15 impossible, for the public to meaningfully participate, further undercutting the
16 Commissioner's representations.

17 **CONSULTANTS' FINAL REPORTS**

18 14. It is highly unlikely that the OIC Staff's consultants' final reports will reflect any
19 material changes to the Form A resulting from the October 22nd discussions since the reports
20 are due to be submitted on October 27th. The personal service contracts entered into by the
21 consultants do not provide for updating the final reports when the Form A is amended or the
22 terms of the transaction are changed. Although, to some extent changes could be dealt with
23 through testimony during the hearing process, proper analysis of material changes may require
24 significant time and effort on the part of the consultants necessitating execution of
25 supplemental contracts and requiring additional time for data gathering and evaluation. It is
26 also possible that after presenting new conditions without a corresponding supplementation of

1 the reports, Premera will take the position at the hearing that substantial portions of the
2 consultants' final reports are not relevant to the current version of the transaction and,
3 therefore, should not be considered or given any weight. The Commissioner and the public
4 are entitled to receive the best of what the consultants can offer concerning the Form A.

5 15. If the Commissioner determines to allow amendments of the Form A after the
6 deadline but desires that the consultants present their opinions regarding the modified Form
7 A, it may become necessary to adjust the schedule to allow the consultants additional time to
8 properly evaluate the changes and submit supplemental reports, if this is possible under the
9 current case schedule and agreeable to the consultants.

10 **EXHIBITS FILED UNDER SEAL**

11 16. Premera has claimed that Exhibits "F" and "I" attached to the Declaration are
12 confidential and proprietary information and should not be disclosed to the public. Although
13 the OIC Staff disputes this characterization with respect to Exhibit "F," nonetheless, both
14 Exhibits have been filed in sealed envelopes pending the Commissioner's determination
15 regarding Premera's justification for designating the materials as confidential. Therefore, the
16 OIC Staff has not furnished copies of these exhibits to the Interveners pending the
17 Commissioner's determination.

18 **RELIEF REQUESTED**

19 17. The OIC Staff requests that the Commissioner disregard any and all amendments
20 filed or to be filed by Premera to its Form A after October 15, 2003 and consider only the
21 Form A as it was constituted as of that date. This would eliminate from consideration of the
22 subject matter contained in the two submissions made by Premera on October 17, 2003
23 encompassing Exhibits "E" through "I" attached to the Declaration. In addition, the OIC Staff
24 requests that the Commissioner direct (1) the OIC Staff not to engage in any further
25 discussions with Premera relating to potential amendments to the Form A and (2) the OIC
26

1 Staff's consultants not to consider any amendments to the Form A in their final reports that
2 were not filed by Premera on or before October 15, 2003.

3 18. In the alternative, if the Commissioner determines that the October 17th filings by
4 Premera are permissible, the OIC Staff requests that the Commissioner extend the deadline for
5 submission of the final reports so that they may reflect as much of Premera's changes to the
6 Form A as possible.

7 19. The OIC Staff requests the Commissioner determine that Premera's designation of
8 Exhibit "F" attached to the Declaration as confidential and proprietary information is without
9 merit and that it be fully disclosed to the public. In the alternative, the OIC Staff requests that
10 if the Commissioner determines that portions of Exhibit "F" contain confidential and
11 proprietary information, the remaining portions be disclosed to the public.

12 20. The OIC Staff requests that the Commissioner schedule a hearing as soon as
13 practicable to consider this motion.

14 DATED this 21st day of October, 2003.

15 Respectfully submitted,

16 OFFICE OF INSURANCE COMMISSIONER
17 STATE OF WASHINGTON

18
19 By: _____
20 John F. Hamje
21 Staff Attorney WSBA #32400
22 Legal Affairs Division
Office of Insurance Commissioner
360-725-7046
360-586-3109 (Facsimile)

23 CERTIFICATE OF SERVICE

24 Pursuant to WAC 10-08-110(3), I certify under penalty of perjury under the laws of the
25 State of Washington that this instrument, except for Exhibits "F," "H," and "I" attached to the
26 Declaration of James T. Odiorne, was served upon all parties of record in this proceeding by

1 transmitting a copy thereof by FAX, and, on the same day, depositing a copy thereof, properly
2 addressed with charges prepaid, with a commercial parcel delivery company, to each party to
3 the proceeding or his or her attorney or authorized agent. Pursuant to the Fifth Order, the
4 instrument, including Exhibits "F," "H," and "I," was served upon Premera and its attorney of
5 record by depositing a copy thereof, properly addressed with charges prepaid, with a
6 commercial parcel delivery company. In addition, the instrument, including Exhibit "H" only,
7 was served upon the Interveners' attorneys of record by depositing a copy thereof, properly
8 addressed with charges prepaid, with a commercial parcel delivery company.

9
10 Dated: October 21, 2003
11 At Tumwater, Washington

John F. Hamje